88-606

No.

Supreme Court, U.S.
FILED
OCT 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF BAYTOWN, TEXAS, ET AL.
Petitioners,

v.

TONY CAMPOS, ET AL.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ARTHUR VAL PERKINS
(Counsel of Record)
STEVEN C. OAKS
C. LEROY MELCHER
Oaks, Hartline & Honey
1300 Wortham Tower
2727 Allen Parkway
Houston, Texas 77019
(713) 529-3110
Attorneys for the City of Baytown, Texas, et al.

RANDALL B. STRONG
City Attorney
City of Baytown
2401 Market Street
Baytown, Texas 77520
Of Counsel
October 5, 1988

QUESTIONS PRESENTED FOR REVIEW

1. Did the Congress of the United States intend for the Voting Rights Act, 42 U.S.C. § 1973, *et seq.*, to protect a coalition of separate minority groups, one racial and the other language, from claims of vote dilution by a political jurisdiction's use of a multi-member electoral scheme?

2. Do the standards for determining a violation of the Voting Rights Act enunciated by the United States Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) in a single minority setting govern such a case as well?

3. Does a coalition of minority groups meet the *Thornburg v. Gingles* standard of being sufficiently large and geographically compact as to constitute a majority in a single-member district where the population of both minority groups is dispersed throughout the political jurisdiction and where the aggregated minority class comprises approximately 65% of the population in a proposed remedial plan?

4. What standard should govern a finding of political cohesiveness of a coalition of minority groups under the doctrines established by *Thornburg v. Gingles*? Is it sufficient for the coalition of minority groups to be politically cohesive or is it required that each minority group contained therein vote cohesively as well?

5. Is the preferred candidate of a coalition of minority groups in all instances a minority candidate? If so, does *Thornburg v. Gingles* require that an examining court review only those elections in a political jurisdiction in which a minority candidate has been a participant?

6. Did the judgment of the district court and the panel of the court of appeals in this case misapprehend significant facts of the case, and, if so, did this result in substantial injustice to the parties?

LIST OF ALL PARTIES

TONY CAMPOS, Plaintiff
CONRAD GARCIA, JR., Plaintiff
VERNON SHIELDS, Plaintiff
ROSCOE C. ASHFORD, Plaintiff
CITY OF BAYTOWN, TEXAS, Defendant
JAMES ALLEN CANNON, Defendant
PERRY SIMMONS, Defendant
ROY FULLER, Defendant
FRED PHILLIPS, Defendant
JIMMY JOHNSON, Defendant
GERALD DICKENS, Defendant
RON EMBRY, Defendant
EMMETT O. HUTTO, Defendant
ROLAND J. PRUETT, Defendant

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF ALL PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
I. This Case Involves Questions of Exceptional Importance	7
II. Review by this Court Will Secure Uniformity of Decisions Among the Lower Courts	12
III. The Judgment of the District Court and the Decision of the Court of Appeals Misapprehended Significant Facts of the Case, Thereby Working Substantial Injustice	16
Conclusion	19
Appendix A [Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Texas (January 5, 1987)]	1a
Appendix B [Order of the United States District Court for the Southern District of Texas (January 5, 1987)]	1b
Appendix C [Judgment of the United States District Court for the Southern District of Texas (March 25, 1987)]	1c
Appendix D [Memorandum and Order of the United States District Court for the Southern District of Texas (March 25, 1987)]	1d
Appendix E [Decision of the United States Court of Appeals for the Fifth Circuit (April 1, 1988)]	1e
Appendix F [Order of the United States Court of Appeals for the Fifth Circuit Denying Rehearing and Rehearing en banc, and Opinion Dissenting Therefrom (July 7, 1988)]	1f

TABLE OF AUTHORITIES

Cases

	Page
Campos v. City of Baytown, Texas, No. H-85-1021, slip op. (S.D. Tex. 1987) (available WESTLAW 8736), *vacated*, 840 F.2d 1240 (5th Cir. 1988)	5, 6, 9
Campos v. City of Baytown, Texas, 840 F.2d 1240 (5th Cir. 1988)	1, 4, 5, 10, 14, 16
Campos v. City of Baytown, Texas, 349 F.2d 943 (5th Cir. 1988) (Higginbotham, J., dissenting from order denying rehearing)	1, 7, 8, 10, 11
Citizens For a Better Gretna v. City of Gretna, Louisiana, 834 F.2d 496 (5th Cir. 1987)	14
City of Carrollton Branch of the National Association for the Advancement of Colored People v. Stallings, 829 F.2d 1547 (11th Cir. 1987)	13
Latino Political Action Committee v. The City of Boston, 784 F.2d 409 (1st Cir. 1986)	17
Rogers v. Lodge, 458 U.S. 613, 102 S. Ct. 3272, 73 L.Ed.2d 1012 (1982) (Stevens, J., dissenting)	10
Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986)	*passim*

Constitutional Provisions

U.S. Constitution Amendment XIV	2, 5
U.S. Constitution Amendment XV	2, 5

Statutes

Judiciary Act, § 1254, 28 U.S.C. § 1254	2
Judiciary Act, § 1331, 28 U.S.C. § 1331	5
Civil Rights Act of 1871, § 1, 42 U.S.C. § 1971	2, 5
Voting Rights Act of 1965, § 1, 42 U.S.C. § 1973	*passim*
Voting Rights Act of 1965, § 4, 42 U.S.C. § 1973b(f)(2)	3
Civil Rights Act of 1871, § 1, 42 U.S.C. § 1983	4, 5

Rules

	Page
Federal Rules of Civil Procedure, Rule 23(b)(2)	5

Other Materials

Blacksher & Menefee, "From *Reynolds v. Sims* to *City of Mobile v. Bolden*", 34 *Hastings L.J.* 1 (1982)	8, 13
S.Rep. No. 97-417, 97th Cong. 2nd Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News, p. 107	13, 14

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF BAYTOWN, TEXAS, ET AL.
Petitioners,

v.

TONY CAMPOS, ET AL.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, the City of Baytown, Texas, *et al.* pray that a Writ of Certiorari be issued to review the decision in this case of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas has not been reported. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 840 F.2d 1240 (5th Cir. 1988). The Order Denying the Petition for Rehearing and the Suggestion for Rehearing En Banc and the Opinion of the six Judges of the Court of Appeals dissenting from the denial of rehearing en banc are reported at 849 F.2d 943 (5th Cir. 1988). All opinions are reproduced in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on April 1, 1988. The timely Petition for Rehearing of Appellants below, Petitioners here, was denied and their Suggestion for Rehearing En Banc was also denied by a four to six decision of the Fifth Circuit on July 7, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifteenth Amendment to the United States Constitution provides, in pertinent part, as follows:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1971, provides, in pertinent part, as follows:

> All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law,

custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

Section 1 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, as amended, provides as follows:

(a) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Section 4 of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(f)(2), provides, in pertinent part, as follows:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The City of Baytown is located in Harris County, Texas. The population of Baytown is 56,917, according to the 1980 decennial census. Of this 1980 population, 9,348 or 16.42% of Baytown's total population is of Spanish surname or Mexican-American origin ("Hispanic") and the City's Black population is 5,096 or 8.95% of Baytown's total population. *Campos v. City of Baytown, Texas,* 840 F.2d 1240, 1241, App. at 2e (5th Cir. 1988).

Few geographically identifiable areas of high concentration of minority population exist in the City. Both Black and Hispanic citizens reside in all voting precincts within the City and are dispersed throughout the community. Hispanics constitute 61% of the population in voting Precinct 102, a precinct also containing a 28% Black population. Voting Precinct 248 contains 658 Black residents out of a total of 697 citizens, 94.5% of the total. *Campos v. City of Baytown, Texas,* 840 F.2d at 1247-48, n. 12, App. at 20e.

Since its incorporation, Baytown's City Council elections have encompassed city-wide voting, known as at-large elections. The City Council consists of six council members and

one mayor. Persons running for City Council in Baytown must run in one of six places (excluding the mayor's seat), must reside in the district for which they run, and must receive a majority of votes from the voters-at-large to win election to that place. *Campos v. City of Baytown, Texas,* 840 F.2d at 1241-42, App. at 2e. The mayor is elected from the City at-large for a term of two years at an election held in odd-numbered years. The six members of the City Council are elected in staggered two-year terms. Three council members are elected annually.

The system of at-large voting provided by the Charter of the City of Baytown was based on political considerations and not on any attempt to discriminate against minority groups. Specifically, the system was established to ensure unity, cohesion and cooperation among the three separate communities, Goose Creek, Pelly and Baytown, which united to form Baytown in 1947. *Campos v. City of Baytown, Texas,* No. H-85-1021, slip op. at 2, App. at 2a (S.D. Tex. 1987) (available WESTLAW 8736), *vacated,* 840 F.2d 1240 (5th Cir. 1988). In order to protect the interests and individuality of the merging communities, however, the City imposed a district residency requirement, requiring that candidates to the City Council reside in the district for which they run.

Respondents, Plaintiffs below, Tony Campos, *et al.,* representing Black and Hispanic residents of the City of Baytown, filed their Original Complaint in this case on February 28, 1985, alleging a denial of voting rights by Petitioners, Defendants below, the City of Baytown, Texas and its then Mayor and City Council, pursuant to 42 U.S.C. §§ 1971, 1973, 1983, 1988, and the Fourteenth and Fifteenth amendments to the Constitution of the United States. Jurisdiction of this matter was proper before the district court pursuant to 28 U.S.C. § 1331. The Court granted Plaintiffs' Motion for Class Certification pursuant to Federal Rules of Civil Procedure, Rule 23(b)(2), over the opposition of Defendants.

A trial to the court (The Honorable John V. Singleton) was held beginning on September 8, 1986. On January 5, 1987, the district court issued Findings of Fact and Conclusions of Law, and an Order requiring the City of Baytown to submit for the court's approval a single-member district plan consisting of at least one district with more than 50% minority voters. *Campos v. City of Baytown, Texas,* No. H-85-1021, slip. op. at 1, App. at 1a, 1b. On February 17, 1987, the City of Baytown filed its Proposed Voting District Plan pursuant to the Order of the district court, which Plan provided for the election of five City Council members by single-member district election, three City Council members by at-large election, and a mayor by at-large election ("5-3-1 Plan"); Council District 1 of the 5-3-1 Plan includes approximately 65.9% Black and Hispanic citizens. Respondents filed a response in opposition to the 5-3-1 Plan; the City of Baytown filed a response in support of the 5-3-1 Plan. On March 25, 1987, the district court issued a Memorandum and Order as well as Judgment, declaring that the City of Baytown's at-large voting system violates the Voting Rights Act, 42 U.S.C. § 1973, *et seq.*, enjoining the City of Baytown from conducting any future City Council elections under the existing at-large voting system, approving the City of Baytown's 5-3-1 Plan, and ordering the City of Baytown to pay to Respondents an agreed amount of attorneys' fees. App. at 1d, 1c.

The City of Baytown timely filed a Notice of Appeal to Final Judgment on April 3, 1987.

On April 1, 1988, the panel of the United States Court of Appeals for the Fifth Circuit issued its Opinion, upholding the district court's findings but vacating and remanding the case to the district court because the 5-3-1 Plan had not been precleared with the United States Department of Justice prior to its approval by the district court.

The City timely filed its Petition for Rehearing and Suggestion for Rehearing En Banc which were denied by the court of appeals per curiam on July 7, 1988. Of the eleven

Circuit Judges who participated in the court of appeals's en banc poll, six joined in a dissenting opinion to the denial of en banc consideration authored by Judge Higginbotham. Their dissents from the denial of rehearing are reported with the court of appeals's per curiam opinion at 849 F.2d 943, and are contained in Appendix F hereto.

REASONS FOR GRANTING THE WRIT

I.

This Case Involves Questions of Exceptional Importance.

This is a case of first impression in which two distinct and historically separate minority groups seek to establish a violation of the Voting Rights Act, 42 U.S.C. §1973, *et seq.*, by claiming dilution of their voting strength through the use of an at-large electoral scheme by a municipality. At issue here is the legal and practical ability of plaintiffs to aggregate multiple minority groups in order to prove the threshold elements necessary to establish such a violation pursuant to this Court's pronouncements.

This Court set forth the standard for plaintiffs seeking to establish a violation of the Voting Rights Act in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). The three threshold elements as stated in *Thornburg v. Gingles* were designed to determine whether a class consisting of a single minority, Black voters in *Thornburg v. Gingles*, could establish a *prima facie* violation of the Voting Rights Act. At issue in the instant case is the applicable standard for establishing a violation of the Voting Rights Act where the plaintiff class consists of a combination of a language and a racial minority, not historically considered to be a single minority or even a combined minority group under the Voting Rights Act; that is, as Judge Higginbotham explained, a class consisting of "a newly defined minority—a coalition of Blacks

and Browns." *Campos v. City of Baytown, Texas,* 849 F.2d at 945, App. at 2f (5th Cir. 1988) (Higginbotham, J., dissenting from denial of rehearing).

Thornburg v. Gingles mandates that Plaintiffs can show a violation of the Voting Rights Act *only* by clearly establishing that the minority class is sufficiently large and geographically compact as to constitute an effective majority in a proposed or potential single-member district, that the minority class is politically cohesive in its voting behavior, and that the white majority, voting as a bloc, usually defeats the preferred candidates of such minority class. *Thornburg v. Gingles,* 106 S.Ct. at 2766-67. Where plaintiffs fail to show that they would be an effective majority in a hypothetical single-member district, they cannot claim that it is the multi-member electoral system which prevents them from electing their chosen representatives. *See, Thornburg v. Gingles,* 106 S.Ct. at 2766, n.15; Blacksher & Menefee, "From *Reynolds v. Sims* to *City of Mobile v. Bolden",* 34 *Hastings L.J.* 1, 56 (1982) (hereinafter Blacksher & Menefee). Stated differently, absent a showing that a single-member district could be established as a remedy, there can be no violation shown by the use of a multi-member district.

In the *Thornburg v. Gingles* situation, the circumstances surrounding this showing, while certainly complex, were relatively straightforward. There, this Court considered a challenge by Black voters to the use of multi-member elections in certain North Carolina state legislative districts. The district court had found distinct geographic concentrations of Black voters in each of the districts sufficiently large and contiguous to constitute an effective majority in a potential single-member election district, and had also been able to analyze the relative success of the candidates for North Carolina legislative seats which were supported by these concentrations of Black voters, finding that the "overall rate of black electoral success" was "minimal." *Thornburg v. Gingles,* 106 S.Ct. at 2760-61.

This Court set out the above referenced "threshold requirements" on the basis of these lower court findings and in the context of easily identifiable pockets of Black and white voters supporting opposing candidates in legislative races. As to each of the threshold requirements: compactness and insularity, racial cohesiveness, and white bloc voting resulting in predictable electoral defeat, this Court's analysis was based upon these North Carolina circumstances, a single minority group, historically cohesive and insular, achieving only minimal electoral success.

The situation in Baytown, indeed in most urban centers of the West and Southwest, is not at all similar to that found in the challenged North Carolina districts. Instead, Blacks and Hispanics make up two distinct minority populations in most cities, and are dispersed throughout such cities' boundaries. The compactness and insularity of a single minority group are not present in the urban centers of the Southwest as they were in North Carolina's legislative districts. Correspondingly, the cohesiveness of this historically segregated, sole minority in *Thornburg v. Gingles* would not be expected of a coalition of a language and a racial minority as in Baytown, particularly when that coalition is composed of citizens dispersed throughout the community's geographic, cultural and economic boundaries.

Indeed, there was much disputed evidence of cohesiveness among Blacks and Hispanics in Baytown presented before the district court, which found, at best, that the evidence *"tends* to show minority political cohesiveness." *Campos v. City of Baytown, Texas*, No. H-85-1021, slip op. at 3-4, App. at 3a (emphasis added). As Judge Higginbotham pointed out in his dissent, the entire issue of cohesiveness as explained by the *Thornburg v. Gingles* Court becomes quite troublesome when examining a coalition of separate minority groups. The district court and the appellate panel "did not require that either group, taken individually, vote as a cohesive unit. The panel's approach thus permits a coalition

of two groups unrelated to each other by more than a common political agenda, and neither of which itself votes cohesively, to qualify for the protections of the Voting Rights Act." *Campos v. City of Baytown, Texas*, 849 F.2d at 946, App. at 5f (Higginbotham, J., dissenting from denial of rehearing). This is a long reach from this Court's cohesiveness requirement as stated in *Thornburg v. Gingles*. *Cf. Rogers v. Lodge*, 458 U.S. 613, 650-651, 102 S. Ct. 3272, 3293, 73 L.Ed.2d 1012 (1982) (Stevens, J., dissenting).

Yet, in the instant case, Respondents have aggregated a racial and a language minority into a single class, claiming that these two minority groups should be treated as a single minority for the purposes of satisfying each and all of the threshold requirements set forth in *Thornburg v. Gingles*. By allowing such an aggregation, the courts below have invited other otherwise unrelated minority groups to successfully withstand threshold analysis where, in fact, there is no violation of the Voting Rights Act.

The panel of the court of appeals concluded that Blacks and Hispanics could be aggregated in order to establish the minority class as sufficiently large and geographically compact to constitute a majority in a single member district. In doing so, the panel of the court of appeals relied not on language from the Voting Rights Act, nor on language from this Court's decision in *Thornburg v. Gingles*, but rather upon a determination that, "[t]here is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics." *Campos v. City of Baytown, Texas*, 840 F.2d at 1244, App. at 5e. Such an easily met standard should not be permitted to form the basis for such an important determination in the total absence of *any* citation to congressional intent or judicial interpretation. As Judge Higginbotham explained, "[t]he question is not whether Congress in the Voting Rights Act intended to *prohibit* such coalitions; instead the proper question is whether Congress intended to *protect* these coalitions. A

statutory claim cannot find its support in the absence of prohibitions." *Campos v. City of Baytown, Texas,* 849 F.2d at 945, App. at 3f (Higginbotham, J., dissenting from denial of rehearing) (emphasis in original).

This case, therefore, presents a ripe opportunity for review by this Court of a troubling issue which will continue to grow until resolved. If, in fact, it is proper to aggregate otherwise unrelated minority groups for purposes of establishing a violation of the Voting Rights Act, then numerous jurisdictions will require guidance in determining what degree of commonality, if any, is required between and among these unrelated groups. It appears to be the opinion of the district court and the panel of the court of appeals that any two or more minority groups may be joined, provided that this newly formed minority shares common experiences of discrimination. In light of the number of potential combinations of racial, language, ethnic and religious minorities which could be combined as a single minority under this type of test, it would appear possible that no class of plaintiffs would fail to meet the threshold requirements of *Thornburg v. Gingles,* something certainly not intended by that case.

Additionally, a finding of cohesiveness within one minority group, as in *Thornburg v. Gingles,* is, as noted above, far different than such a finding within and among two separate minority groups, one racial and one language, which share absolutely no cultural or historical identity. Yet the panel of the court of appeals accepted the district court's findings of a "tendency" towards cohesiveness among Blacks and Hispanics in Baytown with virtually no discussion and little analysis of the disputed evidence on this important element. Indeed, the panel of the court of appeals has merely held that this finding was not clearly erroneous, far from the standard that should be required for such an important test. *See, Campos v. City of Baytown, Texas,* 849 F.2d at 946, App. at 5f (Higginbotham, J., dissenting from denial of rehearing).

These questions of interpreting the *Thornburg v. Gingles* formulations in the context of a dual minority setting are of exceptional importance and clearly have not been sufficiently addressed by either the district court or the court of appeals. A clear answer should be provided as to whether the Voting Rights Act was intended to protect a coalition of separate minorities, and, if so, exactly how the *Thornburg v. Gingles* threshold requirements should apply to this hybrid minority coalition.

II.

Review by this Court Will Secure Uniformity of Decisions Among the Lower Courts.

Directly impacting upon their findings that a cohesive coalition of Blacks and Hispanics had seen the candidates of its choice usually defeated by a bloc voting, white majority, the district court and panel of the court of appeals determined to examine only those few municipal elections in Baytown where a minority candidate had run for public office and been defeated. Thus, these courts examined only eight of the elections ever held in Baytown, and in doing so ignored a wealth of evidence introduced by the City, including expert testimony. Such testimony showed a lack of cohesiveness among Hispanic voters, a complete lack of cohesiveness between Hispanic and Black voters, an absence of white bloc voting, as well as evidence that the candidates of choice of Baytown's minority citizens, both Black and Hispanic, were usually elected to municipal office, especially those candidates favored by the city's Black voters.

Petitioners argued that the district court should examine a reasonable and historically relevant number of elections in its analysis of the instant case. Obviously, a decision as to what constitutes a reasonable and historically relevant number of elections is a significant, perhaps determinative,

element of the final decision in a Voting Rights Act case. Whether a reviewing court should examine only those few elections involving minority candidates, as urged by the district court and the panel of the court of appeals, is an issue that should be resolved. At present, no clear determination has been made.

In order to determine whether a Voting Rights Act violation exists, courts have varied greatly on whether the race of the candidate is an issue to be considered. Speaking for the plurality in *Thornburg v. Gingles,* Justice Brennan stated that, "[i]t is the *status* of the candidate as the *chosen representative of a particular racial group,* not the race of the candidate, that is important." 106 S.Ct. at 2776 (emphasis in original); *cf.* 106 S.Ct. at 2783-84 (White J., concurring), and 106 S.Ct. at 2793 (O'Connor, J., concurring in the judgment). This is consistent with the assertion espoused by Blacksher & Menefee that "[r]eceipt of the racial minority's bloc support would be the best, and necessary, indication that a candidate is identified with the minority's particular interest. The candidate need not be a member of the racial minority." Blacksher & Menefee, at 59. The Eleventh Circuit has adopted and applied this concept in its analysis of which elections should be examined in order to establish a violation of the Voting Rights Act. In *City of Carrollton Branch of the National Association for the Advancement of Colored People v. Stallings,* the court stated that "[u]nder Section 2, it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate that is important." 829 F.2d 1547, 1557 (11th Cir. 1987).

Such an approach would appear to be consistent with this Court's admonition that lower courts conduct " ' "an independent consideration of the record" ' " and " 'a searching practical evaluation of the "past and present reality" ' " of a political subdivision in examining issues of minority cohesiveness and white bloc voting. *Thornburg v. Gingles,* 106 S.Ct. at 2779, *quoting,* S.Rep. No. 97-417, 97th Cong.

2nd Sess. 29-30, *reprinted in* 1982 U.S. Code Cong. & Admin. News, p. 207-208 (footnote omitted). Indeed, it is noteworthy that in the legislative history governing the 1982 amendments to the Voting Rights Act, construed by this Court in *Thornburg v. Gingles*, there are numerous references to ensuring minority populations' opportunity to elect candidates of their choice, but nowhere is even a hint given that this is meant to mean candidates of their choice *and race*. For example, Senator Robert Dole, given credit for fashioning much of the legislative compromise that resulted in final passage of the amendments, noted that:

> Citizens of all races are entitled to have an equal chance of electing candidates of their choice, but if they are fairly afforded that opportunity, and lose, the law should offer no redress.

S. Rep. No. 97-417, 97th Cong. 2nd Sess. 193, *reprinted in* 1982 U.S. Code Cong. & Admin. News, p.364.

In addressing this issue in the instant case, the court of appeals has taken the opposite position. In *Citizens For a Better Gretna v. City of Gretna, Louisiana*, the court had determined, "that the race of the candidate is in general of less significance than the race of the voter—but only within the context of an election that offers voters the choice of supporting a viable minority candidate." 834 F.2d 496, 503 (5th Cir. 1987). In *Campos v. City of Baytown, Texas*, the panel of the court of appeals reiterated and specified that the preferred candidate of minority voters is a minority candidate. 840 F.2d at 1245, App. at 7e-8e. The panel subsequently tempered this assertion by noting that, "[i]f the minority candidate is not serious and gains little support from any segment of the community, it cannot be said that the minority community 'sponsored' the candidate and that election need not be examined." *Id.* at n.7. Such, Petitioners argued below, was exactly the case in virtually all minority candidacies in Baytown, offering the reviewing court even

fewer elections to examine under the panel of the court of appeals's formulation.

The clear effect of this position is that an examining court is directed to study those elections where a minority candidate received the support of the minority community, but not those races where a non-minority candidate was supported by the same minority community. Such an effect is clearly beyond the scope of congressional intent in drafting the Voting Rights Act, and does little to help a lower court in seeking to analyze the *Thornburg v. Gingles* criteria.

The standard set forth by this Court in *Thornburg v. Gingles* has established the scope of inquiry for a claim involving a single minority class. Based upon this standard, minority groups that are not sufficiently large and geographically compact as to constitute a majority in a single-member district could not be heard to complain that a multi-member electoral system caused their lack of political success. If, on the other hand, such a minority group could aggregate itself with other minority groups, whether language, racial, religious, or otherwise, then this newly conglomerated minority would arguably satisfy the *Thornburg v. Gingles* threshold requirements. Such a conglomeration elevates the Voting Rights Act from a shield to be raised defensively for the protection of minority interests to a sword which could be used offensively by political minorities. Such a sword would effectively make illegal the existence of a multi-member electoral system and, using the court of appeals's analysis, comes perilously close to mandating proportional representation, directly contrary to congressional intent and judicial precedent. This transformation of the Voting Rights Act directly conflicts with that provision of the Voting Rights Act which provides that the absence of proportional representation is not *per se* a violation. 42 U.S.C. §1973(b). The panel

of the court of appeals and the district court should not be permitted to so clearly alter congressional intent.

III.

The Judgment of the District Court and the Decision of the Court of Appeals Misapprehended Significant Facts of the Case, Thereby Working Substantial Injustice.

As noted herein, the court of appeals panel opinion in this case cavalierly approved the district court's aggregation of separate minority populations of Black and Hispanic voters in Baytown by claiming that "nothing in the law" prevents such a combination. *Campos v. City of Baytown, Texas,* 840 F.2d at 1244, App. at 5e. Even so, the panel still was aware that:

> To prove the fact of their electoral dilution, plaintiffs must prove that the minorities so identified actually vote together and are impeded in their ability to elect their own candidates by all of the circumstances, including especially the bloc voting of a white majority that usually defeats the candidate of the minority.

Id. In making findings as to each of these elements, the panel of the court of appeals seriously misapprehended the facts before it, working substantial injustice in this case and offering improper guidance to the numerous political jurisdictions which must rely on the court's opinion in this area of the law.

To determine that this combined minority was sufficiently large and compact enough to meet the initial *Thornburg v. Gingles* test, the panel of the court of appeals relied *solely* upon what it described as "three different plans proposed by the plaintiffs" as well as the City's proposed 5-3-1 Plan, and the level of minority population contained in each. The fatal flaw with this analysis was that "plaintiffs' plans" were not

proposed plans at all, but merely exhibits of certain voting precincts in the City, combined hypothetically, which were *not* sufficiently large to be considered as actual single-member districts under relevant legal and Department of Justice guidelines.

While the 5-3-1 Plan does contain a 65.9% combined minority population, no finding was made by the district court that this figure is sufficiently large to provide a potential for such minority voters to elect the representatives of their choice. Here the percentage reflects a *combined* minority population, not the single minority group found in *Thornburg v. Gingles* and for which a 65% population in a single-member district is generally required to ensure this potential. *See, Latino Political Action Committee v. The City of Boston,* 784 F.2d 409, 414 (1st Cir. 1986). Such is particularly the case where the district includes voting Precinct 248, the predominately Black precinct which the panel of the court of appeals refused to consider as an extreme case, but which nonetheless consistently has voted *against* Hispanic candidates for City Council in Baytown.

As to cohesiveness, the district court's entire analysis was based upon a total acceptance of Respondents' expert testimony and total rejection of that of Petitioners. In doing so, the district court rejected any examination of election returns and trends from the one voting precinct in Baytown which could clearly exhibit the voting patterns of a racial group, Precinct 248, the 95% Black precinct. These election patterns were vital to an analysis of elections in Baytown because they illustrated an extremely cohesive Black population, voting in a non-cohesive way with the City's Hispanic population, and electing their candidates of choice in overwhelming numbers. Of particular interest was the fact that the two most recent Hispanic candidates for City Council received far less support from these Black voters than from any other precinct in the City, including those overwhelm-

ingly white precincts. Petitioners' expert showed that precinct 248 was representative of the Black community in Baytown.

Just as Respondents' expert witness failed to utilize any Precinct 248 results in his testimonial analysis, so the district court refused to examine these results, finding solely from limited testimony by one of the named plaintiffs that Precinct 248 was not representative of the City's Black population as a whole. This testimony was contradicted by other witnesses and by Respondents' own statistical evidence which showed far less support for Hispanic candidates by Blacks *outside* of Precinct 248 than by the Hispanic population.

As to the final *Thornburg v. Gingles* requirement, that a bloc voting, white majority usually defeats the preferred candidate of the minority class, the panel of the court of appeals affirmed the district court's finding by citing the fact that no minority has ever been elected to the Baytown City Council. The district court had ignored evidence that the vast majority of these candidacies were not serious attempts at office and that the most recent and most serious attempt, the 1986 candidacy of Mario Delgado, received substantial white support, directly contrary to Respondents' claims of bloc voting. Indeed, in its analysis of the Delgado defeat, where the Hispanic candidate received a majority of votes in three predominately white precincts and over 45% of the vote in four others, the district court appeared to find that the failure of Delgado's candidacy, despite his Hispanic support, meant the existence of white bloc voting.

Thus, as to all three of the vital *Thornburg v. Gingles* threshold requirements, the district court and the panel of the court of appeals directly misapprehended significant facts of the case resulting in substantial injustice.

CONCLUSION

The standards enunciated by this Court in *Thornburg v. Gingles* set forth a detailed, three-part threshold requirement to govern an examining court's analysis of vote dilution claims in a case brought under the Voting Rights Act. That case, however, involved the claims of a single minority population, geographically compact and insular, historically and politically cohesive, which had enjoyed only minimal electoral success.

For the political jurisdictions in the West and Southwest, fundamental questions of interpretation under the Voting Rights Act remain unanswered, and the answers supplied by the district court and the panel of the court of appeals in this case appear to be directly contrary to congressional intent. The aggregation of separate racial and language minorities into a minority coalition, essential in this case for Respondents to prevail, is particularly troubling as there exists no judicial precedent or congressional support to extend the Act's protection to such political coalitions. Likewise, the finding that such a coalition is politically cohesive because the minority groups vote together in certain elections, without more, appears to fall far short of the "politically cohesive" requirement of the *Thornburg v. Gingles* opinion, particularly when the panel of the court of appeals mandates an examination of only the few elections in which a minority candidate participated.

It is essential that these questions be answered by this Court in its review of this case and that a clear standard be established.

Respectfully submitted,

ARTHUR VAL PERKINS
(Counsel of Record)
STEVEN C. OAKS
C. LEROY MELCHER
OAKS, HARTLINE & HONEY
1300 Wortham Tower
2727 Allen Parkway
Houston, Texas 77019
(713) 529-3110
Attorneys for the City of Baytown, Texas, et al.

RANDALL B. STRONG
City Attorney
City of Baytown
2401 Market Street
Baytown, Texas 77520

Of Counsel

APPENDIX

APPENDIX

A. Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Texas (January 5, 1987) 1a

B. Order of the United States District Court for the Southern District of Texas (January 5, 1987) 1b

C. Judgment of the United States District Court for the Southern District of Texas (March 25, 1987) 1c

D. Memorandum and Order of the United States District Court for the Southern District of Texas (March 25, 1987) 1d

E. Decision of the United States Court of Appeals for the Fifth Circuit (April 1, 1988) 1e

F. Order of the United States Court of Appeals for the Fifth Circuit Denying Rehearing and Rehearing en banc, and Opinion Dissenting Therefrom (July 7, 1988) 1f

In the

United States District Court

For the Southern District of Texas
Houston Division

TONY CAMPOS, *et al.*, *Plaintiffs*, V. CITY OF BAYTOWN, TEXAS, *et al.*, *Defendants.*	CIVIL ACTION NO. H-85-1021

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause of action was brought by a group of minority citizens who reside in Baytown, Texas. These citizens allege that as a result of the manner in which City Council elections are conducted, on an at-large basis, minorities do not have an equal opportunity to participate in the political processes and to elect candidates of their choice. A court trial was held beginning on September 8, 1986.

A. FINDINGS OF FACT

1. The City of Baytown is located in Harris County, Texas. The population of Baytown according to the 1980 census is 56,917. Defendants' Exhibit 5.

2. Of this total population, 9348 are Hispanic and 5096 are Black. Hispanics constitute 16.42 % of the population of

Baytown and Blacks constitute 8.95%. The combined minority population is 14, 444, or 25.4% of the total population of Baytown. Def. Ex. 6.

3. Baytown City Council elections are currently held on an at-large basis. Citizen's vote at-large for six council members and a mayor. A candidate for any position must receive majority of votes to be elected. Def. Ex. 18. The at-large voting system was originally instituted in 1947 for the purpose of unifying the town and to prevent provincialism that could be caused by separate districts. Blacks were disenfranchised in Texas in 1947, therefore the effect of an at-large voting system upon minorities was not taken into account.

4. No minority has been elected to the Baytown City Council. Four different minority candidates have run in eight separate races. These four candidates were Tony Campos, Joe Gonzalez, Ruby Hardy and Mario Delgado. Plaintiffs' Exhibit 8.

5. The court finds the minority population in Baytown to be relatively compact and insular. Census data from 1980 reflects that Blacks and Hispanics primarily reside in the southern portion of Baytown. Many of the census tracts with a percentage of minority population are identical for Blacks and Hispanics. For instance, the tract with greatest percentage of Hispanics, tract 264, is also the tract with the highest percentage of Blacks. Tracts 265, 267.01, 267.03, 273, 272, 269.02, and 268 also have substantial population of both Blacks and Hispanics. Many of these tracts are contiguous as well. Def. Ex. 6C & 6D, maps. Another way to examine compactness is to determine what percent of a minority population lives in a geographically confined area. The court finds that 64.62% of all Blacks in Baytown live in tracts 273, 264, 272, 267.01, 267.03 and 268. With the exception of tract 268, these tracts are contiguous and located in the southern and southwestern part of town. The court also finds that 58.1% of all Hispanics in Baytown reside in tracts 264, 272,

273 and 271. These tracts are contiguous and located in the southern part of town. Pl. Ex. 10 and 11.

6. Plaintiffs created hypothetical single member districts within Baytown using existing precinct boundaries. Using vote totals from those precincts composing the new districts, the minority candidates won in the hypothetical districts. Pl. Ex. 1-4.

Testimony of plaintiffs witnesses Tony Campos, Vernon Shields and Mario Delgado also tends to show minority political cohesiveness. Campos and Delgado both testified to the fact that they would have won their elections if they had been held in one of the hypothetical districts. Campos, Shields and Delgado all testified to Blacks and Hispanics working together on political campaigns, and that Blacks and Hispanics had similar concerns over political issues. The court does not finds credible the testimony of defendants witnesses Mr. Breames or Reverend Davis. Each of these witnesses was only familiar with precinct 248. Reverend Davis does not reside in Baytown and Mr. Breames had considerable difficulty understanding counsels' questions and could not distinguish an at-large voting system from a single member district.

7. The court finds that racial polarization exists. Racial polarization is the situation where minority voter votes for a candidate who is a member of that minority, and conversely, Whites do not vote for the minority candidate. Regression analysis performed on City Council races in Baytown where a Minority was a candidate illustrate racial polarization. Pl.Ex. 15

Regression analysis is a method of analyzing statistics to determine if certain factors are related and to what degree they are related. Regression analysis uses a sample to generalize about a larger group. Here, plaintiffs' expert conducted regression analyses on election results in six elections, two of which were school board elections. Plaintiffs' expert used a

computer to generate a graph or plot of points along two axes. The vertical axis is the proportion of votes cast for the minority candidate and the horizontal axis is the proportion minority of the voting population. The regression analysis generates a plot of points from data entered into the computer, and a line through these points most accurately describing that configuration. It is the correlation coefficient of this line, r, the slope of the line, and the statistical significance of the r value that are the operative values of regression analysis. The correlation coefficient, r, has a value anywhere from zero to one or zero to negative one. Perfect correlation, here absolute racial polarization, would result in an r of zero. Complete reverse polarization or negative correlation would result in an r of negagive one. The significance value reflects the probability that an r as high as was found would occur by chance if in fact there were no correlation at all. A significance factor of .05 or lower makes r a reliable value. Another important value is the "intercept", or where the line describing the plotted points crosses the vertical axis. In this case the intercept value describes the degree of white support for the minority candidate.

In Mario Delgado's race for City Council against Perry Simmons, the regression analysis showed a correlation coefficient of .92, slope of .98, and a significance of .000. This indicates a very strong correlation between hispanic voters and votes for Mario Delgado. In addition, the intercept showing white support was only .36. Similarly, in Tony Campos' race in 1984 for City Council, the regression analysis showed a correlation coefficient of .86, a slope of 1.17 and a significance of .000. Again, these results show a very strong correlation between hispanic voters and votes for Campos. The intercept in this analysis was .26.

The analysis performed on the Joe Gonzalez race in 1976 showed a correlation coefficient of .78, slope of .65 and significance of .0027. Although these figures do not show as high a correlation as in the Delgado and Campos races, a

correlation still exists linking hispanic voters to votes for Gonzalez. White support was very low with an intercept of .04.

The analysis performed on the 1979 Ruby Hardy race showed a correlation coefficient of .78, slope of .80 and a significance of .0009. These results show a strong correlation between black voters and votes for Hardy. Again, white support was very low with an intercept of .06.

Plaintiffs' expert also performed regression analysis on two school board races involving the black candidate David Smith. These races were the general election and runoff in 1984. The analysis generated an r of .90, slope of .78 and significance of .000 in the general election and an r of .89, slope of .70 and significance of .000 in the runoff. These are very high r values with excellent statistical significance. The correlation between votes for Smith and proportion of black voters is very strong. The intercepts of these two analyses were .2 and .41 showing greater white support in the runoff. Pl.Ex.15.

In addition, plaintiffs' expert also conducted regression analysis relating ethnic composition of a precinct (proportion minority) to proportion of voters received by a minority candidate. These analyses differ from those above where the analyses focused on one minority population, black or hispanic, while these analyses focus on a combined minority population.

The analysis performed on Mario Delgado's council race in 1986 generated an r value of .69, slope of .46 and a significance of .0031. This is quite a high correlation with good statistical significance. The intercept was .37. The analysis performed on Tony Campos' race in 1984 yielded an r value of .52, slope of .33 and significance of .0456. Although this is the lowest r value introduced into evidence and the significance value is quite high, plaintiffs' expert testified that a correlation does exist and is statistically sig-

nificant. White support was low with an intercept of .28. The Ruby Hardy race was also analyzed and generated an r value of .85, slope of .75 and significance of .0002. This is a very high correlation and excellent statitical significance. White support was very low with an intercept of .02. Plaintiffs' expert also analyzed David Smith's general election and runoff for the school board in 1986. This analysis generated and r value of .90, slope of .93 and significance of .0000 in the general election and in the runoff an r value of .88, a slope of .72 and a significance of .0000. These correlations are very high and the statistical significance is excellent. The intercepts were .15 and .37 showing an increase in white support in the runoff. Pl. Ex. 19 Therefore, the regression analysis illustrates clear correlation between proportion of votes received by a minority candidate and the proportion minority of precinct voters. This correlation exists both in the instance where the expert regressed the proportion of voters received by a minority candidate on the proportion of a specific minority, Black or Hispanic, of precinct voters and where the expert performed the analysis using the proportion of combined minorities of precinct voters on the horizontal axis. In addition, white support was universally low with all intercept values lower, in most cases much lower, than .41.

8. The court also finds the existence of white bloc voting. In seven precincts in which Whites constituted greater than 90% of the population, Delgado lost all districts in 1986 and Campos lost all districts in 1984. In addition, David Smith lost all districts in his 1984 general race for a position on the school board, and lost six out of seven in the runoff. The seventh precinct was somewhat irrelevant because part of that precinct is outside of Baytown. In that precinct as a whole, Smith won in the runoff. Pl. Ex. 18.

9. The court finds that the preferred candidate of minority voters is a minority candidate. Testimony of plaintiffs' witnesses, Vernon Shields in particular, reflected this finding. In addition, Plaintiffs' exhibits showed that minority voter

turnout increased dramatically in the years when a minority candidate was running for council. Pl. Ex. 20. This indicates that minorities have significantly more interest in White versus Minority races than White versus White races. This court finds that the White versus White races that defendants requested this court to examine are not probative of minority preference.

10. The court finds that Minorities in Baytown exhibit lower socio-economic factors than Whites in Baytown. In areas of education, houshold income, percent below poverty line, occupational status and unemployment, Blacks and Hispanics were markedly different from their white counterparts. Plaintiffs' evidence on education show that 17% of Whites, 7% of Blacks and 4% of Hispanics had a college degree, and 29% of Whites, 47% of Blacks and 63% of Hispanics had less than a high school education. Plaintiffs' evidence on household income shows that 14% of Whites, 3% of Blacks and 7% of Hispanics make more than $40,000.00 a year. On the other hand, 14% of Whites, 29% of Blacks and 21% of Hispanics make less than $10,000.00 a year. In addition, only 6.7% of Whites are below the poverty line, while 22.3% of Blacks and 19.6% of Hispanics are below the poverty line. In illustrating occupational status, plaintiffs divided occupations into two groups: first, a group including service occupations, handlers, equipment cleaners, helpers, and laborers; and second, a group including executive, administrative, managerial, professional and specialty occupations. Twenty-two percent of Whites, 10% of Blacks and 7% of Hispanics in Baytown held jobs in the second group, while 11% of Whites, 31% of Blacks and 33% of Hispanics held jobs in the first group. Finally, in Baytown, 4.2% of Whites are unemployed while 9.6% of Blacks and 7.2% of Hispanics are unemployed. Pl. Ex . 14.

11. The court finds that both Blacks and Hispanics would benefit by the creation of single member districts similar to those proposed by the plaintiffs. Defendants have

expressed concern for what they term "black submergence" in the larger hispanic population in the proposed single member districts. In plaintiffs' proposed plans, Blacks would constitute approximately 22%, 25% and 27% of the new proposed districts compared with the Hispanic composition of 50%, 51% and 49% respectively. Pl. Ex. 5, 6, and 7. Blacks would be a smaller percentage of the district population than Hispanics, but all the proposed districts considerably exceed the 8.95% of Blacks in Baytown as a whole . Blacks, too, will have markedly greater voting power in one of the proposed single member districts than in Baytown as a whole.

12. The court finds that precinct 148, employed by defendants in an extreme case analysis, has too many characteristics that make it unpersuasive as an indicator of black preference. Precinct 248 is 89% black and therefore it is used as a barometer for the black vote. Pl. Ex. 13. Defendants have shown that Precinct 248 voters prefer white candidates to minority candidates. Def. Ex. 11. However, precinct 248 has the smallest total population, 701 people, of all the precincts. The next largest, precinct 12, has more than twice the population of precinct 248. The largest precinct, precinct 28, has a population of 7,396. The black population of precinct 248 is 624 persons while the total black population for Baytown is 5096 persons. Precincts 28 and 102 each has a lower percentage of Blacks than 248 but has a greater number of Blacks. In addition, registered voters in precinct 248 number only 347. The greatest number of those who have ever voted was 90 in 1984. Def. Ex. 34. Therefore, it is difficult for this court to draw broad generalizations about black voters in Baytown from black voters in precinct 248.

13. The court finds that the City of Baytown has been responsive to the needs of minorities in several ways. The City of Baytown employs and has employed many Blacks and Hispanics. The total percentage of minority employees in 1985 was 24.6%. Def. Ex. 20. Several minorities have been appointed to various boards and commissions in Baytown.

Def. Ex. 21 & 22. In addition, the numbers of housing rehabilitation projects and expenditures for rehabilitation in District 1, a minority district, far exceeds the rehabilitation and expenditures in other districts. Def. Ex. 23 & 24. All streets and drainage improvements from 1979 to 1985 have occurred in District 1. Def. Ex. 26. In addition, the City Council has entertained and/or adopted motions and resolutions effecting the well-being of minorities on issues such as the revision of the City Charter in 1969, the hiring of unskilled workers, an affirmative action plan, a neighborhood clean-up program, and a street improvement plan. Def. Ex. 27-31.

B. CONCLUSIONS OF LAW

1. This case is brought under §2 of the Voting Rights Act which reads as follows:

> (a) No voting qualification or prerequisite to voting or standard practice, or procedures shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in §1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided* that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. 1973.

2. Section 2 was amended to its present form in 1982. The 1982 revision established that a violation of §2 could be proven by showing discriminatory *effect* and that discriminatory *intent* need not be proven. S. Rep. No. 97-417, 97th 2nd Sess. 28 (1982), *reprinted* in 1982 U.S. Code Cong. & Ad. News, 177, 205. The question asked by the revised § 2 is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidiates of their choice." *Id.*

3. Congress intended this question to be answered by examination of seven *Zimmer* factors, so called for a case of the same name. *Zimmer v. McKeithen* 485 F. 2d 1297 (5th Cir. 1973), *aff'd sub nom. East Carroll Parish School Board v. Marshall,* 424 U.S. 636 (1976) (per curiam). These factors are: (1) the history of voting-related discrimination in the political subdivision; (2) the extent to which voting in the elections of the political subdivision is racially polarized; (3) the extent to which the political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination; (4) the exclusion of members of the minority group from candidate slating processes; (5) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment and health which impair their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; and (7) the extent to which members of the minority group have been elected to public office in the jurisdiction. S. Rep. No. 97-417, 9th Cong. 2d Sess. 28-29 (1982) *reprinted in* U.S. Code Cong. & Ad. News, 205, 297. Another factor noted by Congress is the responsiveness of elected officials in the political subdivision to needs of minorities. *Id.* Other factors may be considered by courts, but no single factor or combination of factors is particularly determinative. *Id.*

4. In the context of multi-member districts or at-large election schemes, however, a special conjunction of circumstances must occur. *Thornburg v. Gingles,* 106 S.Ct. 2752, 2766 (1986). "Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive geographically insular minority group." *Id.* Broken down into individual factors, the minority group must prove: (1) that it is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that it is politically cohesive; and (3) that the white majority votes sufficiently as a bloc to enable it in the absence of special circumstances, usually to defeat the minority's preferred candidate. *Id* at 2766-67. The second and third facts are elements of the larger phenomenon of racially polarized voting. *Id* at 2769. This Court has determined that these three factors are the threshold consideration, after which other *Zimmer* factors can be taken into account.

5. The first factor, that the minority is sufficiently large and geographically compact to constitute a majority in a single member district, has been proven by the plaintiffs. Plaintiffs created three districting plans in which the combined minority population created a majority in a proposed single member district. Pl. Ex. 5-7. Plaintiffs also showed the Court four hypothetical districts composed of existing precincts in which minority candidates would have won their elections. Pl. Ex. 1-4. In addition, the Court has examined maps depicting concentrations of minority population and found that the minority population is sufficiently compact. Def. Ex. 6A-D.

6. Plaintiffs have proven that the Minorities in Baytown are politically cohesive. Plaintiffs' hypothetical districts prove cohesiveness sufficient to elect minority candidates within the hypothetical districts. Pl. Ex. 1-4. Plaintiffs' witnesses also testified to minority political cohesiveness. Political cohesiveness, as an element of racially polarized voting, has also been illustrated with regression analysis.

Plaintiffs have proven minority political cohesiveness with its regression analysis, both within minority groups and across minority groups. Pl. Ex. 15 & 19. In the analyses performed on specific minorities, Plaintiffs' expert found a high correlation between the proportion of votes received by the minority candidates and the proportion of minority voters. Pl. Ex. 15. This illustrates a political cohesiveness within one minority group, Black or Hispanic. Plaintiffs' expert also found high correlations when he regressed the proportion of votes received by the minority candidate on the proportion of combined minority voters, Black and Hispanic. Pl. Ex. 19. Only one race in this second analysis is a relatively low correlation coefficient. The second regression analysis illustrates political cohesiveness between Blacks and Hispanics in voting for candidates of either race.

7. Plaintiffs have also proven the third element of the threshold inquiry, white bloc voting. Plaintiffs have shown that in all city council races in which a minority candidate has run, the minority candidate has lost. Pl. Ex. 12. In addition, in seven precincts with greater than 90% white population, Mario Delgado lost every one in 1986, Tony Campos lost every one in 1984, and David Smith, running for school board, lost every one in 1984 with the exception of precinct 386 in which he lost the general election and won the runoff. It should be noted, however, that a portion of precinct 386 is outside of Baytown. Pl. Ex. 13. White bloc voting is a necessary corollary to minority polarized voting. Plaintiffs' regression analysis, in addition showing a correlation between votes for minority candidates and proportion of minority population also shows the degree of white support in the "intercept" value. Intercept values ranged from a low of .02 to a high of .41, showing white support for minority candidates ranging from 2% to 41%. The values are quite low and indicate a large majority of white voters, in some instances a vast majority of white voters, supporting white candidates.

8. The Court concludes that Plaintiffs have proven the threshold elements of compactness, cohesiveness and white bloc voting. Defendants have presented a very different view of elections in Baytown. The primary difference between the evidence presented by plaintiffs and defendants is that defendants request that the Court examine all elections in the past several years and not just elections where a minority was a candidate. Def. Ex. 9 & 10. The underlying premise for this request is defendants' contention that a preferred candidate of a minority voter is not necessarily a minority candidate. Defendants ask this Court to find that precincts where a substantial number of minorities reside have a preferred candidate in every election regardless of whether a minority is running. The court would than have to determine in every election whether the minority's preferred candidate had won or lost. The conclusion the defendants want this Court to reach is that minorities have seen their preferred candidates elected at least 75% of the time. Def. Ex. 9. This court cannot accept defendants' premise or their argument for the following reasons.

First, the Supreme Court recognizes that the preferred candidate of a minority is a minority candidate. *Thornburg* at 2776 (plurality). The Court states that that was the situation in the case before them. *Id.* Of course, the Court is careful to point out, the race of the candidate is not the important factor, rather the status of the candidate as the chosen representative of a particular racial group is crucial. *Id.* Nevertheless, it is obvious to this Court that race and status can coincide.

In the case before this Court, race and status do coincide. The testimony of plaintiff's witness, Vernon Sheilds, indicates that he prefers minority candidates. Defendants did not controvert this testimony or counter it with witnesses of their own. Additionally, the court found that minority voter turnout increased markedly in years when a minority was running. Pl. Ex. 20.

Another reason for not adopting defendants' view of the evidence is that all defendants' results depend entirely upon the relatively few occasions upon which minorities chose to run for city council. Had minorities run more often, defendants results would have been poorer and vice versa. This court cannot consider evidence and results from evidence that depends so heavily on such fortuitous events. Additionally, the relative infrequency of minority candidacy may itself be a factor of race, making defendants request of this court even more suspect.

9. Now the court turns to the *Zimmer* factors that have been proven in this case. One of the most important of these is the existence of racially polarized voting. Since racially polarized voting shows minority cohesiveness and white bloc voting and both of these elements were discussed above in the courts threshold considerations, the discussion here will be limited. Plaintiff's expert showed the existence of racially polarized voting in Baytown through the use of regression analysis. Pl. Ex. 15 & 19. Plaintiff's exhibit 15 showed very high correlation coefficients and corresponding low significance values. A strong correlation across several elections was proven between votes for minority candidates and and the proportion of minorities of the same race in a precinct. Plaintiffs exhibit 19 also showed high correlation coefficients and good overall significance levels. Plaintiffs thereby proved a strong correlation between votes for minority candidates and proportion of combined minorities in a precinct.

Defendants attempted to undermine the credibility of plaintiffs expert, Dr. Brischetto, by calling the Court's attention to Judge Higginbotham's concurrence in a denial of a petition for panel rehearing. *Jones v. City of Lubbock*, 730 F.2d 233 (5th cir. 1984). In his concurrence, Judge Higginbotham severly questioned Dr. Brischetto's statitical methods. This court believes Dr. Brischetto has been vindicated by the Supreme Court in *Thornburg* where the State of North Carolina adopted Judge Higginbotham's skepticism.

Thornburg at 2773 n. 32. After a lengthy analysis of the State's arguments, *id* at 2772-79, the Court concludes.

> In sum, we would hold that the legal concept of racially polarized voting, as it relates to claims of vote dilution, refers *only* to the *existence of a correlation* between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation of intent in order to prove a "prima facie" case of racial bloc voting and defendants may not rebut that case with evidence of causation or intent.

Id. at 2779 (emphasis added).

10. The next *Zimmer* factor of importance to this case is the extent to which minority group members bear the effects of past discrimination in education, income, poverty, occupational status, and unemployment. Minorities in Baytown fall significantly behind Whites in these catagories and the Court concludes that the minorities in Baytown carry with them the results of past discrimination to a substantial extent. Pl. Ex. 14.

11. Another *Zimmer* factor to be considered in this case is the extent to which members of a minority group have been elected to public office. No minority has been elected to Baytown City Council since its incorporation in 1947. One minority, David Smith, has been elected to the Goose Creek Independent School District Board.

12. The final factor to consider is the responsiveness of elected officials to the particularized needs of members of the minority group. Defendants have introduced a wealth of evidence on this issue and plaintiffs do not contest it. Defendants have shown that the City of Baytown has been responsive to the needs of minorities in areas of minority employment, appointments to boards and commissions, housing rehabilitation, streets and drainage improvements and that the council has dealt directly with issues of concern to minorities such as city charter amendments, CETA programs,

affirmative action plans and neighborhood cleaning. Def. Ex. 20-31.

Although the City's efforts in these areas over the years have been commendable, this single factor alone is not sufficient to mitigate the seriousness of the many results of past discrimination that the minority citizens of Baytown must bear—in particular their inability to participate fully in the electoral system in Baytown.

13. Therefore, the court concludes that a Section 2 violation does exist, impairing the ability of the minority citizens of Baytown to elect candidates of their choice.

Baytown City Council shall present this court with a plan including a minority single-member district, in which minority voters shall be the majority, in accordance with an order to be entered by the court, within 60 (sixty) days of the date of that order.

(N.B. The Findings of Fact and Conclusions of Law are reproduced here from the copy filed by the district court.)

In the

United States District Court

For the Southern District of Texas
Houston Division

TONY CAMPOS, *et al.*,

Plaintiffs,

V.

CITY OF BAYTOWN, TEXAS, *et al.*,

Defendants.

CIVIL ACTION NO.
H-85-1021

ORDER

In accordance with Findings of Fact and Conclusions of Law entered on this day in the above-captioned matter, it is hereby

ORDERED, ADJUDGED and DECREED that the City of Baytown shall present this court, for approval, a voting district plan that shall include a single-member district. It is

FURTHER ORDERED that the single-member district must be a minority district; that is, one that is more than 50% minority, combined Black and Hispanic, in population. It is

FURTHER ORDERED that the above plan shall be submitted to the court for approval within sixty (60) days of the entry of this Order.

In the

United States District Court

For the Southern District of Texas
Houston Division

TONY CAMPOS, *et al.*, *Plaintiffs,* V. CITY OF BAYTOWN, TEXAS, *et al.*, *Defendants.*	CIVIL ACTION NO. H-85-1021

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law entered January 5, 1987, and the Memorandum and Order entered on this date, it is hereby

DECLARED that defendants' at-large voting system violates 42 U.S.C. § 1973. It is hereby

ORDERED, ADJUDGED, and DECREED that defendants are enjoined from conducting any future city council elections in Baytown under the existing at-large voting system. It is hereby

ORDERED, ADJUDGED, and DECREED that defendants' new 5-3-1 plan, as submitted to the Court, is legal, constitutional and approved by the court without modification. It is

FURTHER ORDERED that defendants shall pay plaintiffs the agreed amount of attorneys' fees representing fees accrued up to and through Judgment. Defendants shall also pay plaintiffs' costs.

In the

United States District Court

For the Southern District of Texas
Houston Division

TONY CAMPOS, *et al.*,

Plaintiffs,

V.

CITY OF BAYTOWN, *et al.*,

Defendants.

CIVIL ACTION NO. H-85-1021

MEMORANDUM AND ORDER

In accordance with this Court's Findings of Fact and Conclusions of Law entered on January 5, 1987, defendants in this case have submitted a redistricting plan to the court to govern all future city council and mayoral elections. Plaintiffs have submitted a response to this plan to the court, and seek institution of a modified plan. Plaintiffs also seek as relief in this action a declaratory judgment, a permanent injunction, attorney's fees and costs.

I. The Plan

Defendant City of Baytown has submitted a redistricting plan for city council and mayoral elections that provides for five (5) council members to be elected from five (5) single member districts, and three (3) council members to be elected at-large by majority vote. In accordance with the Court's Order of January 5, 1987, one of the five districts is a minority district with greater than fifty percent combined Black & Hispanic population.

Plaintiff's response states that plaintiffs will approve of the plan only if the three at-large council members are elected in one election by plurality vote. Therefore, plaintiffs' plan contemplates that from a field of candidates, the three who received the most votes would win. Plaintiffs request this modification to the plan to permit "bullet voting"or "single shot voting" which would more readily allow another minority candidate to be elected. Defendants oppose plaintiffs' modification and seek to preserve the majority vote requirement and the election of at-large members in individual elections, or "numbered place elections." Although defendants' plan increases the size of city council and thereby dilutes the political strength of each council member including the member from the newly created minority district, the court does not find defendants' plan unconstitutional or illegal and therefore must pay some deference to the legislative plan.

When this court declared the existing at-large system in Baytown illegal, it sought to allow the City of Baytown the opportunity to rectify the situation with a plan of its own rather than impose a court-devised plan. *Wise v. Lipscomb,* 437 U.S. 535, 540 (1978). A Court should only undertake to divise and impose a plan itself when the legislative body is not responsive, or the election is too near to permit the legislative body to act. *Id.* Expediency or nonresponsiveness were not at issue here, so the court directed Baytown City Council to devise a plan. Although a court-devised plan is subject to "equitable considerations demand[ing] a close scrutiny and mandat[ing] the fashioning of a near-optimal" plan, a legislative plan is not so subject. *Seastrunk v. Burns,* 772 F.2d 143, 151 (5th Cir. 1985). Even if the legislative plan is not the optimum choice, federal courts must defer to legislative judgment absent the unconstitutionality or illegality of the plan. *Id.* In this case, plaintiffs have not alleged that the plan is unconstitutional or illegal. Plaintiffs only recommend the modification to the plan because it might allow the election of another minority candidate. Plaintiffs'

modification might create a more desirable plan, but that alone is insufficient to supplant the legislative process. *Id.* Therefore, defendants 5-3-1 plan will be approved.

II. Declaratory Judgment

Plaintiffs' complaint seeks relief in the form of a declaratory judgment, in accordance with 28 U.S.C. § 2201 et seq. and Rule 57 of the Federal Rules of Civil Procedure, finding the existing method of electing members to the city council in Baytown illegal. The Court's Findings of Fact and Conclusions of Law expressly state that a violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, exists. Findings and Conclusions at 21. There is no question that this case presents a substantial controversy of sufficient immediacy and reality between parties having adverse legal interests. *Middle South Energy, Inc. v. City of New Orleans,* 800 F.2d 488, 490 (5th Cir. 1986). Therefore, a declaration of illegality shall be incorporated into the final judgment. *See, e.g. Thornburg v. Gingles,* 106 S.Ct. 2752, 2762 (1986).

III. Injunctive Relief

Plaintiff also requests injunctive relief in this case, specifically enjoining the continued use of the existing at-large plan for electing council numbers. There is little doubt that an injunction is an appropriate remedy in this case. *See, e.g., Thornburg* at 2762. The plaintiff has prevailed on the merits and the Court has found a violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973. Findings of Fact and Conclusions of Law at 21. The harm to the plaintiff if the existing plan is permitted to continue would be irreparable. *Beacon Theaters v. Westover,* 359 U.S. 500, 506-07 (1959). In addition, plaintiffs have no adequate remedy at law. *Id.* Therefore, defendants shall be enjoined from conducting any future city council elections under the existing at-large system.

IV. Attorney's Fees

The parties have informed the Court that they have reached an agreement as to the amount of attorneys' fees up to and through this court's judgment in this case. The agreement will be reflected in the final judgment.

For the reasons stated above, it is hereby

ORDERED, ADJUDGED, and DECREED that

(1) defendants' 5-3-1, as submitted to the Court is APPROVED;

(2) defendants at-large voting system is DECLARED ILLEGAL under 42 U.S.C. § 1973;

(3) defendants are ENJOINED from conducting any future city council elections in Baytown under the at-large voting system; and

(4) defendants pay plaintiffs the agreed amount of attorneys' fees representing fees accrued up to and through Judgment.

In the

United States Court of Appeals

For the Fifth Circuit

TONY CAMPOS, *et al.*,

Plaintiffs-Appellees, Cross-Appellants,

V.

CITY OF BAYTOWN, TEXAS, *et al.*,

Defendants-Appellants, Cross-Appellees.

NO. 87-2359

April 1, 1988

Before CLARK, Chief Judge, and REAVLEY, Circuit Judge, and HUNTER,* District Judge.

REAVLEY, Circuit Judge:

This is a voting rights case. We uphold the district court's finding, as not clearly erroneous, that the at-large election of City of Baytown council members constitutes a violation of § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (Supp.1987) (as amended June 29, 1982), because of vote dilution of the politically cohesive combination of Blacks and Mexican-Americans. However, the 5-3-1 plan, proposed by the city and adopted by the district court, has not been precleared. *See* 42 U.S.C. § 1973c. We, therefore, vacate the district court's approval of the plan and remand for compliance with § 1973c.

I.

The City of Baytown, located in Harris County, Texas, had a 1980 census population of 56,917. Of that, 9348 (16.42%) were Hispanic and 5096 (8.95%) were Black. The combined minority population was 14,444 (25.4%).

Baytown has an at-large election system for its six city council members and its mayor. Although elected at-large, each council member has to reside in a particular district resulting in a numbered-post system.[1] Additionally, there is a majority vote requirement.[2] The system has remained unchanged since Baytown was formed in its present shape in 1947. No minority member, either Black or Hispanic, has ever been elected to the Baytown City Council.

A number of Hispanic and Black citizens of Baytown brought this suit, individually and as a class action, alleging that the at-large system was a violation of § 2 of the Voting Rights Act. 42 U.S.C. § 1973. Combining Blacks and Hispanics as one minority group, the district court found that the minority group was sufficiently large and geographically insular to form a majority in a single member district. Focusing exclusively on elections with minority candidates, the court found that Blacks were cohesive, Hispanics were cohesive, together the minority group was cohesive, and that Anglos voted sufficiently as a bloc to usually defeat the minority's preferred candidate. To review the totality of the circumstances, the court considered the factors enumerated in *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir.1973) (en banc), *aff'd sub. nom. on other grounds, East Carrol Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) (per curiam), and concluded that a § 2 voter dilution violation was established.

The court then ordered the city to submit an alternate plan. Baytown responded with a 5-3-1 plan that had five council members elected from districts including one minority district, three council members elected at-large, and one

mayor elected at-large. Paying heed to legislative deference, the district court adopted the city's plan.

II.

A.

In *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the Supreme Court, for the first time, considered the 1982 amendments to § 2 of the Voting Rights Act, 42 U.S.C. § 1973,[3] in the context of a challenge to an at-large election system. The Court noted that the purpose for the congressional amendment to § 2 was to eliminate the requirement of showing discriminatory intent in a challenge to a contested electoral mechanism. *Gingles,* 106 S.Ct. at 2759; *see City of Mobile, Ala. v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). Instead, the "results test" of *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), was re-established. Specifically, the Court found that the Senate Judiciary Report focused on the *Zimmer* factors in showing a § 2 voter dilution claim. *Gingles,* 106 S.Ct. at 2759-60.[4] Although many or all of the factors are relevant in a challenge to an at-large system, the Court concluded that "the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice," unless "a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Gingles,* 106 S.Ct. at 2766 (emphasis in original).

That test breaks down into three parts: First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district .... Second, the minority group must be able to show that it is politically cohesive .... Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed,—usually to defeat the minority's preferred candidate.

Gingles, 106 S.Ct. at 2766-67 (cross citation omitted). The second and third parts, cohesion and majority bloc voting, are usually proven by statistical evidence of racially polarized voting. *Gingles,* 106 S.Ct. at 2768-69. As the Court explained:

> the question whether a given district experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices. A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and, consequently, establishes minority bloc voting within the context of § 2. And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting.

Gingles, 106 S.Ct. at 2769-70 (citation omitted).

The ultimate finding of minority voter dilution is then to be based on the totality of the circumstances. *Gingles,* 106 S.Ct. at 2782. That finding, and its subsidiary findings, are subject to the clearly erroneous standard of appellate review for fact finding. *Gingles,* 106 S.Ct. at 2781; Fed.R.Civ.P. 52(a). Under that standard, "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)). If the factual determinations are based on determinations of the witnesses' credibility, or on reasonable interpretation or inferences from the testimony or other evidence, the district court's findings cannot be clearly erroneous. *Anderson,* 470 U.S. at 574-75, 105 S.Ct. at 1511-12.

B.

There is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics. Section 1973(a) protects the right to vote of both racial and language minorities. *See* 42 U.S.C. §§ 1973(a), 1973b(f)(2). Congress itself recognized "that voting discrimination against citizens of language minorities is pervasive and national in scope," 42 U.S.C. § 1973b(f)(1), and similar discrimination against Blacks is well documented. If, together, they are of such numbers residing geographically so as to constitute a majority in a single member district, they cross the *Gingles* threshold as potentially disadvantaged voters. To prove the fact of their electoral dilution, plaintiffs must prove that the minorities so identified actually vote together and are impeded in their ability to elect their own candidates by all of the circumstances, including especially the bloc voting of a white majority that usually defeats the candidate of the minority.

III.

A.

Gingles requires that the minority group be "sufficiently large and geographically compact to constitute a majority in a single member district." *Gingles,* 106 S.Ct. at 2766. The district court found that the minority group was concentrated in the southern sections of Baytown. Evidence was introduced that contiguous single member districts with 72.3% minority population (50% Hispanic, 22.3% Black), 75.4% minority population (50.7% Hispanic, 24.7% Black), and 76.9% minority population (49.5% Hispanic, 27.4% Black)[5] were possible. Additionally, the City's plan, adopted by the district court, has a single member district (out of five) that has a 65.9% minority population (44.6% Hispanic, 21.3% Black). The district court was not clearly erroneous in deciding that this *Gingles* requirement was satisfied.

Baytown argues that since there are Blacks and Hispanics spread throughout the city and since 51% of Baytown's Blacks and 44% of its Hispanics do not live in the minority district, the plaintiffs have failed to show that it is compact and insular enough to meet the *Gingles* requirement. We disagree. The fact that there are members of the minority group outside the minority district is immaterial. All that is required is that the minority group be *"sufficiently* large and geographically compact to constitute a majority in a single member district." *Gingles,* 106 S.Ct. at 2766 (emphasis added). As the Court explained, the purpose behind the requirement is that "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles,* 106 S.Ct. at 2766-67 n. 17 (emphasis in original). The plaintiffs demonstrated that potential here. Just because not all of the minorities in Baytown are in the district does not mean that *Gingles'* first part is not satisfied.

B.

The next important step under *Gingles* is to determine whether the minority group is politically cohesive. That is not an inquiry to be made prior to and apart from a study of polarized voting, as Baytown argues, because the central focus is upon voting patterns. The Supreme Court has made clear that "[t]he purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates." *Gingles,* 106 S.Ct. at 2769. It follows that a minority group is politically cohesive if it votes together.

One question that arises, in the admission of evidence or the court's evaluation of the evidence, is identifying the elections to be examined. The district court here examined

only those elections that had a minority member as a candidate. Baytown argues that the court should have examined all elections, including Anglo-Anglo races.

The Supreme Court stated that "[t]he number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances. One important circumstance is the number of elections in which the minority group has sponsored candidates." *Gingles,* 106 S.Ct. at 2770 n. 25. Baytown responds that the Court also stated that is is "the *status* of the candidate as the *chosen representative of a particular racial group,* not the race of the candidate, that is important." *Gingles,* 106 S.Ct. at 2776 (emphasis in original). Therefore, Baytown concludes, any time a candidate gets a majority of the minority votes he is the "chosen representative" of the minority group.

We disagree. The district court was warranted in its focus on those races that had a minority member as a candidate. *Cf. Citizens For a Better Gretna v. City of Gretna, La.,* 834 F.2d 496, 503 (5th Cir.1987) (Black candidate was sponsored by minority group "because he received a significant portion of black vote and because he is black."). As *Citizens For a Better Gretna,* 834 F.2d at 503, points out, Justice Brennan's statement that the race of the candidate is unimportant carried only four members of the Court in *Gingles.* Justice White specifically disavowed it and the other four Justices agreed with Justice White. *See Gingles,* 106 S.Ct. at 2783-84 (White, J., concurring) & 106 S.Ct. at 2793 (O'Connor, J., concurring in the judgment). The focus in *Gingles* was on a candidate *sponsored* by the minority group. 106 S.Ct. at 2770 n. 25. Indeed, *Gingles* itself looked only to elections where Black candidates were running. The *Gretna* panel stated: *"Gingles* is properly interpreted to hold that the race of the candidate is in general of less significance that the race of the voter—but only within the context of an election that offers voters the choice of supporting a viable minority candidate." *Citizens for a Better Gretna,* 834 F.2d at 503. There was no

evidence that any Anglo-Anglo race for Baytown City Council offered the voters the choice of a "viable minority candidate." Indeed, the evidence showed, as the district court found, that minority voter turnout increased dramatically when there was a candidate who was a member of the minority group. Contrary to Baytown's assertions, the district court properly focused only on those races that had a minority member as a candidate.

Baytown argues that, in order to show cohesion when there are two minorities that make up the minority group, plaintiffs must show that Blacks are cohesive, that Hispanics are cohesive and that Blacks and Hispanics are together cohesive. We think that that burden is too great, if not impossible, in certain situations.[6] Instead, the proper standard is the same as *Gingles:* whether the minority group together votes in a cohesive manner for the minority candidate. That can be done by examining elections when there was a minority candidate. The key is the minority group as a whole. Of course, if one part of the group cannot be expected to vote with the other part, the combination is not cohesive. If the evidence were to show that the Blacks vote against a Hispanic candidate, or vice versa, then the minority group could not be said to be cohesive. But if the statistical evidence is that Blacks and Hispanics together vote for the Black or Hispanic candidate,[7] then cohesion is shown.

The evidence presented here by the plaintiffs' expert, Dr. Brishetto, embraced five elections. Two of those elections pitted a Hispanic candidate versus an Anglo candidate in the contest for the Baytown City Council District 1 seat. Another election pitted a Black against an Anglo in the 1979 race for City Council District 3. The other two elections were the 1986 general election and runoff for the Goose Creek Independent School District[8] between a Black and an Anglo. The results of the elections were examined by Dr. Brishetto's use of ecological correlation and regression analysis.[9]

The "r" and "r^2" values for the Black candidates all show an excellent correlation. Baytown does not contest that both Blacks and Hispanics vote as a bloc for the Black candidate. Baytown, however, does challenge the district court's conclusion that the minority group is cohesive. Specifically, Baytown claims that Blacks do not vote for the Hispanic candidate. They rely on their expert's extreme case analysis[10] to show that Blacks do not vote for the Hispanic candidate. Additionally, Baytown points out that the "r" values are higher for the Campos and Delgado races when only Hispanics are plotted as the minority group as opposed to when Blacks and Hispanics are the minority group.

The district court made explicit findings on the statistical evidence of the voting pattern of the combined minority in the Delgado and Campos races. For the Delgado race, the court found that the "r" value of .69, slope of .46 and significance of .0031 was "quite a high correlation with good statistical significance." For the Campos race, the court found that the "r" value of .52, slope of .33 and significance of .0456 were the lowest values introduced but, as testified by Brishetto, they were still statistically significant.

The court explicitly rejected the use of Precinct 248. That is the heart of Baytown's complaint. Precinct 248 is the precinct that Baytown used as its extreme case analysis for Blacks in Baytown. Additionally, inclusion of Precinct 248 on the statistical graphs for the Campos and Delgado contributes significantly to the smaller "r" values and slopes for the two races.[11] In essence, Baytown's whole argument that Blacks are not cohesive with Hispanics comes down to a challenge that the district court was clearly erroneous in rejecting the use of Precinct 248. If Precinct 248 is an aberration, and could properly be ignored, then the statistical evidence showed that Blacks and Hispanics as one minority were politically cohesive.

There are two things about Precinct 248 on which everyone agrees: it is extremely small, both in area and population,

and it is overwhelmingly Black. Its total population is 697 people of whom 658 or 94.4% are Black. In the 1986 race between the Hispanic Delgado and the Anglo Simmons, Simmons received 51 votes and Delgado received 7 votes. In other words, the Anglo received 88% of Precinct 248's votes. In the 1984 race between the Hispanic Campos and the Anglo Simmons, Simmons received 75 votes and Campos received 13. That means that the Anglo received approximately 85% of Precinct 248's votes over the Hispanic candidate. That, Baytown concludes, shows that the Blacks in Baytown vote for the Anglo candidate over the Hispanic candidate.

Although Precinct 248 is overwhelmingly Black, it contains less than 13% of the Black population. There have never been more than 90 voters in local elections in Precinct 248. If Precinct 248 is not representative of the Black population in Baytown, it cannot serve as an extreme case analysis. For a number of reasons, we conclude that the district court was not clearly erroneous in rejecting the use of Precinct 248 as a measure of the Black vote. First, there was testimony from Tony Campos that Precinct 248 was controlled by one man. That man was the first Black principal at a local high school, who worked for the county at the time of these elections in 1984 and 1986, and felt that support of Simmons was important to retaining his job. The one-sideness of both the 1984 and 1986 election results in Precinct 248 indicates that neighborhood politics were at work. Baytown argues that a local Precinct 248 businessman and the pastor of the local church both testified that Precinct 248 was representative of the Black community in Baytown. The district court rejected both witnesses as not being credible. Both, the court found, were familiar only with Precinct 248; the businessman could not understand a number of questions and the pastor did not live in Baytown. When the findings of a district court are based on the credibility of the witnesses, that finding can almost never be clearly erroneous. *Anderson,* 470 U.S. at

575, 105 S.Ct. at 1512. The district court could properly conclude that Precinct 248 was an aberration based on the witnesses' testimony.

A close examination of the evidence also reveals a second reason for rejecting the use of Precinct 248 as indicative of Black voting preference in Baytown. If Precinct 248 is to be used as an extreme case analysis, it should be predictive of other Black votes. Precinct 102 contains approximately 64% more Blacks than Precinct 248. Precinct 102 contains the largest absolute number of Blacks of any precinct in Baytown.[12] Assuming that Blacks vote in approximately equal percentage in both precincts, the results in Precinct 248 should, if that is a valid extreme case analysis, predict the approximate number of Black votes for a candidate in Precinct 102. In the 1986 Delgado-Simmons race, Simmons received 51 votes to Delgado's 7 votes in Precinct 248. Since Precinct 102 has 64% more Blacks, Simmons should have received approximately 84 votes from Blacks in Precinct 102. Actually, in Precinct 102 Simmons received only 35 votes and Delgado received 243. Those 35 votes are far short of the predicted 84 votes that Simmons should have received from Blacks if Precinct 248 were representative. Instead, given that Precinct 102 is also 11% Anglo, the opposite conclusion is appropriate: Blacks in Precinct 102, the largest number of Blacks in any precinct, voted overwhelmingly for Delgado. The 1984 Simmons-Campos race also breaks down the same way. Precinct 248 voted 75-13 for Simmons. That should indicate that approximately 123 Blacks in Precinct 102 should have voted for Simmons. But, in fact, only 58 votes were cast in that race for Simmons with Campos receiving 167 votes in Precinct 102.[13]

We are not "left with the definite and firm conviction," *Anderson*, 470 U.S. at 573, 105 S.Ct. at 1511, that the district court made a mistake in rejecting the use of Precinct 248. The court could properly conclude that Precinct 248 was an aberration based both on the testimonial and statistical

evidence. The plaintiffs showed that Blacks and Hispanics, as one minority, were cohesive. Using extreme case analysis with Precinct 248, Baytown attempted to show that Blacks were not cohesive with Hispanics since Blacks did not vote for the Hispanic candidate. If that evidence had been unrebutted, then cohesion would be doubtful. However, the plaintiffs presented probative evidence to rebut Baytown's showing.

Baytown's other arguments on cohesion also fail. The district court could reject Baytown's expert's testimony which relied primarily on Precinct 248 as an extreme case analysis as well as a large number of Anglo-Anglo races to indicate minority preference. The standing evidence showed that Blacks and Hispanics, as one minority, were politically cohesive. The district court's finding on the second part of the *Gingles* test was not clearly erroneous.

C.

Statistical evidence of racially polarized voting also bears on the third part of the *Gingles* test: "whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates." 106 S.Ct. at 2769. As explained by the court, "a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting." *Id.* at 2770.

Here, the evidence of racially polarized voting supports the district court's conclusion that white bloc voting usually defeats the minority candidate. There have been eight different elections for the Baytown City Council where minority members were candidates, and the minority candidate has never won. Three election results are illustrative of the white bloc voting. In the 1986 race for City Council Position 1, Mario Delgado received approximately 83% of the minority votes but only 37% of the Anglo vote and lost the election.

In the 1984 race for Position 1, Tony Campos received 63% of the minority vote but only 29% of the white vote and lost the election. In the 1979 race for Position 3, Ruby Hardy received approximately 78% of the minority vote but only 3% of the white vote and lost the election. In all, the evidence was sufficient to show that the whites vote sufficiently as a bloc to overcome the minority votes plus the white "cross-over" vote.

Baytown argues that the preferred candidate of the minority does win a significant percentage of the elections. Here the argument again points to Anglo-Anglo contests. As already stated the inquiry of racially polarized voting properly focused only on those contests that had a candidate sponsored by the minority group. Those were the contests that had a minority member as a candidate.

Baytown also argues that there is no white bloc voting. Specifically, they argue that Mario Delgado received 44% of the total vote including many whites. Therefore, they conclude, the whites do not vote as a bloc. The argument misses the point. *Gingles* does not require total white bloc voting. Instead, it requires only that "white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Gingles,* 106 S.Ct. at 2767. The Delgado election is a good example: despite overwhelming minority support (83%), the whites voted as a bloc (63%) to defeat him. The fact that Delgado had support of 37% of the whites, and came relatively close to winning, does not mean that there was not determinative white bloc voting. Instead, the white bloc voting defeated the combined strength of minority votes plus white crossover votes. *Gingles,* 106 S.Ct. at 2769.

Finally, Baytown argues that the minority candidate does not always lose. They point to the fact that David Smith, a Black man, won an at-large seat for the Goose Creek I.S.D. Although the Goose Creek I.S.D. is a relevant political entity, it also includes precincts outside of Baytown. Those precincts

voted overwhelmingly for Smith and the evidence was conflicting as to whether Smith would have won if the election was exclusively in Baytown. Indeed, the statistical evidence, *see supra* n. 9, indicates that despite near unanimous minority support, Smith received only 37% of the white vote in the Baytown precincts. That was the same percentage that Delgado, who lost, received. In other words, that election does not necessarily indicate that a minority member could win a seat on the Baytown City Council. In fact, none ever have. Additionally, the occasional win by a minority's preferred candidate would not preclude the finding of racially polarized voting. *See Gingles,* 106 S.Ct. at 2779-80.

The district court's finding of white bloc voting, the third part of the *Gingles* test, was not clearly erroneous.

D.

After making the initial *Gingles'* factors determination, the district court turned to the *Zimmer* factors[14] to determine whether, under the totality of the circumstances, there was a § 2 voter dilution claim. The court found that there was racially polarized voting, that the Blacks and Hispanics suffer the lingering socio-economic effects of past official discrimination, and that no minority has ever been elected to the Baytown City Council. The district court did find that the city had been responsive to the needs of the minority but concluded that that one factor does not mitigate the seriousness of the minorities "inability to participate fully in the electoral system in Baytown." Hence, the court concluded that a § 2 violation of minority voter dilution existed.

Baytown's principal argument at this point is that a finding of responsiveness precludes a finding of a § 2 violation. We have rejected that argument before, *Jones v. City of Lubbock,* 727 F.2d 364, 381 (5th Cir.1984), and we do so again. A finding of responsiveness does not necessarily

preclude a § 2 violation. As we stated before, "Congress has expressly disapproved excessive reliance on responsiveness." *Id.* Baytown's argument that the district court's finding of a § 2 violation was clearly erroneous is without merit.

IV.

Having upheld the district court's finding of a § 2 violation, we cannot affirm the court's remedy. The 5-3-1 plan was proposed by the City and accepted by the district court. Since that was a legislative plan (i.e., proposed by the political body) it must be precleared. *McDaniel v. Sanchez,* 452 U.S. 130, 153, 101 S.Ct. 2224, 2238, 68 L.Ed.2d 724 (1981) (error for court to act on county's proposed plan before submitted for preclearance); *Wise v. Lipscomb,* 437 U.S. 535, 542, 98 S.Ct. 2493, 2498, 57 L.Ed.2d 411 (1978) (district court should not address a plan proposed by legislative body in response to a voter dilution claim until the proposed plan has been precleared); *see also* 42 U.S.C. § 1973c (preclearance). The 5-3-1 plan has not been precleared. Both sides agree that we must vacate the adoption of the plan. We vacate the judgment and remand to the district court in order that Baytown may submit the plan for preclearance.

VACATED and REMANDED.

* District Judge of the Western District of Louisiana, sitting by designation.

1. A numbered-post system requires a candidate to declare for a particular seat on a governmental body. The candidate then runs only against other candidates who have declared for that position. The voters then have one vote for that seat. The system prevents the use of bullet, or single shot, voting. *See Thornburg v. Gingles,* 478 U.S. 30, ____, 106 S.Ct. 2752, 2760 nn. 5 & 6, 92 L.Ed.2d 25 (1986).

2. A majority vote system requires that in order to win an election, a candidate must receive more than 50% of the vote. If there are more than two candidates and no candidate receives more than 50% of the vote, then the top two vote-getters engage in a run-off election.

3. Section 2(b), as amended, 42 U.S.C. 1973(b), provides:

> A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

4. Those factors are:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice, or procedure is tenuous.

Gingles, 106 S.Ct. at 2759-60 (quoting S.Rep. No. 97-417, 97th Cong. 2nd Sess. 28-29 (1982), 1982 U.S.Code Cong. & Admin.News 177, 206-07).

5. The three districts were in three different plans proposed by the plaintiffs.

6. For example, if the heavily minority precincts in an election district have roughly equal percentages of both Blacks and Hispanics, it could prove to be nearly impossible to attribute the votes of those precincts to one minority group or the other but quite possible to determine whether the two minority groups together are politically cohesive.

7. That is not to say that the court must look at every election where there is a minority candidate. If the minority

candidate is not serious and gains little support from any segment of the community, it cannot be said that the minority community "sponsored" the candidate and that election need not be examined.

8. The Goose Creek ISD includes all of Baytown plus an area outside the city. Both sides concede that it is a relevant political entity when examining racially polarized voting.

9. The votes from each election were plotted on a diagram that had one axis as the percent of minority population in a precinct. The other axis had the percentage vote for the minority candidate. A straight line was then plotted for the data and an "r" value was found for each election. The "r" value is derived from the deviation of the data from the fitted straight line. The "r" value can range from -1 to 1 with 1 being perfect correlation, 0 being no correlation, and -1 indicating perfect inverse correlation. The value "r^2" is also calculated and that is the "coefficient of determination." The slope of the line is also determined as is a significance figure. The slope of the line indicates the increase in the percentage of votes for the minority candidate as the percentage of minorities increase and the significance indicates the probability that the "r" value occurred by chance. Additionally, the intercepts of the line indicate the Anglo and minority percentage vote for the minority candidate.

The values of the figures for each election (with the name and racial identification of the minority candidate) were:

Election	r	r^2	slope	significance	Est. % Anglo Vote for Minority	Est. % Minority for Minority
District 1	.69	.48	.46	.0031	37%	83%
Baytown City Council 1986: Mario Delgado (Hispanic).						
District 1	.52	.27	.33	.0456	29%	62%
Baytown City Council 1984: Tony Campos (Hispanic)						
District 3	.85	.72	.75	.0002	3%	78%
Baytown City Council 1979: Ruby Hardy (Black).						
Position 5	.90	.81	.93	.0000	14%	100%
Goose Creek ISD 1986 General Election: David Smith (Black).						
Position 5	.88	.78	.72	.0000	37%	100%
Goose ISD 1986 Runoff Election: David Smith (Black).						

The use of this bivariate ecological regression analysis was cited with approval by the Supreme Court. *Gingles,* 106 S.Ct. at 2768.

10. Extreme case analysis relies on a selected part of the group to predict the behavior of the whole group. In an election context, if you can find a precinct that is overwhelmingly one group, then you can perform the extreme case analysis. For example, if you have a precinct that is 100% Black and that precinct votes 80% for candidate A, then you can extrapolate that 80% of all of the Blacks voted for candidate A. The fallacy of the method arises if the precinct, for one reason or another, is not representative of all Blacks.

11. See Appendixes A & B (Campos and Delgado ecological correlation and regression analysis graphs). In both graphs, Precinct 248 is represented by the data point towards the lower right hand corner. If that data point is eliminated, the line's (which is fitted to the data points) slope becomes greater. Additionally, the "r" value, which is an inverse measure of the data points from the line (i.e., the greater the deviation, the smaller the "r" value), would also increase.
12. Precinct 102 is march larger than Precinct 248. Its ethnic makeup breaks down to 61% Hispanic, 28% Black and 11% Anglo. However, there is a total Black population of 1079 compared with 658 Blacks in Precinct 248.
13. There is a difference between the two races. The 1986 race by Delgado was better funded and more serious than Campos's 1984 race. Delgado received considerably more votes than did Campos.
14. *See supra* n. 4.

[N.B. Illustrations Omitted]

In the

United States Court of Appeals

For the Fifth Circuit

TONY CAMPOS, *et al.*,

Plaintiffs-Appellees, Cross-Appellants,

V.

CITY OF BAYTOWN, TEXAS, *et al.*,

Defendants-Appellants, Cross-Appellees.

NO. 87-2359

July 7, 1988

ON PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 1, 1988, 5th Cir.1988, 840 F.2d 1240)

Before CLARK, Chief Judge, REAVLEY, Circuit Judge, and HUNTER,* District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in

regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

Before CLARK, Chief Judge, GEE, REAVLEY, POLITZ, KING, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS and JONES, Circuit Judges.**

HIGGINBOTHAM, Circuit Judge, with whom GEE, GARWOOD, JOLLY, DAVIS and JONES, Circuit Judges, join dissenting from denial of rehearing en banc:

Today this court refuses to consider en banc whether the protections of the Voting Rights Act extended to Blacks and Hispanics also apply to a newly defined minority—a *coalition* of Blacks and Browns. The court thus accepts this simple statement in the panel opinion:

> There is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics. Section 1973(a) protects the right to vote of both racial and language minorities. *See* 42 U.S.C. §§ 1973(a), 1973b(f)(2). Congress itself recognized "that voting discrimination against citizens of language minorities is pervasive and national in scope," 42 U.S.C. § 1973b(f)(1), and similar discrimination against Blacks is well documented. If, together, they are of such numbers residing geographically so as to constitute a majority in a single member district, they cross the [*Thornburg v.*] *Gingles* [478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986)] threshold as potentially disadvantaged voters.

Campos v. City of Baytown, 840 F.2d 1240, 1244 (5th Cir. 1988). This is a disturbing reading of a uniquely important statute, and one with the potential to affect the very structure of every school district, county, and city government in most states of this nation.[1] It is puzzling then that the panel opinion cites no authority and offers no reasoning to support its fiat.

To the contrary, the pronouncement, despite its Olympian ring, is no more than the result of asking the wrong question. The question is not whether Congress in the Voting Rights Act intended to *prohibit* such coalitions; instead, the proper question is whether Congress intended to *protect* those coalitions. A statutory claim cannot find its support in the absence of prohibitions. Playing with the structure of local government in an effort to channel political factions is a heady game; we should insist that Congress speak plainly when it would do so. Thus, even if the panel had attempted to support its fiat with inferences of intent gleaned from the statute, it would not have been proper to do so.

Despite the panel's conclusion, the fact that Congress extended voting rights protection to language minorities does not answer the question whether Congress intended to extend protection to a group consisting of two distinct minority groups. In deciding to protect language minorities, Congress recognized that language and racial minorities share many disabilities. To assume, however, that a group composed of both minorities is itself a protected minority is an unwarranted extension of congressional intent. A group tied by overlapping political agendas but not tied by the same statutory disability is no more than a political alliance or coalition. I have explained before my concern that so stretching the concept of cohesiveness dilutes its effectiveness as a measure of the causal relationship among the statutory disability, election structures or processes, and election outcomes. *See LULAC v. Midland Independent School District,* 812 F.2d 1494, 1503 (5th Cir. 1987) (Higginbotham, J., dissenting). I explained there that:

> The purpose of the Act is to redress racial or ethnic discrimination which manifests itself in voting patterns or electoral structures. The tie to race or national origin in Justice Brennan's opinion in *Gingles* is the raw corre-

> spondence in votes and outcome. Its three step inquiry assumes a group unified by race or national origin and asks if it is cohesive in its voting. If a minority group lacks a common race or ethnicity, cohesion must rely principally on shared values, socio-economic factors, and coalition formation, making the group almost indistinguishable from political minorities as opposed to racial minorities. At the least, concluding that a political group lacking the cementing and predictive force of common race or national origin is nonetheless politically cohesive under *Gingles* is a difficult undertaking with significant risks. The risks include the reality that diluting the requirement of cohesion expands the mission of the Act beyond the treatment of present-day manifestations of chronic bigotry to a more general device for accommodating majority government and plural constituents—thereby revealing a distrust of the ability of our republican government to do so.

Id. at 1504. Although we took *Midland* en banc, we did not reach the issue of cohesiveness because we decided the case on state-law grounds. *See LULAC v. Midland Independent School District,* 829 F.2d 546, 547-48 (5th Cir. 1987) (en banc). Nevertheless, the assertion that the groups consolidated in *Midland* were cohesive in the *Gingles* sense was sheer fiction. It was interest-group politics and nothing more; and here we again confuse a cohesive voting minority with protected minorities who sometimes share similar political agendas. In the process, we lose sight of the proper question: whether a vote counts for less because it was cast by a Black or Spanish-surnamed citizen.

The panel's theory also is troubling because it carries the potential to *limit* the protections of the Voting Rights Act in certain contexts. When an aggregation of Blacks and language minorities is sufficiently cohesive, it will presumably represent *both* groups in the count of minority districts. Where the combined group comprises more than half of a voting population, the panel's approach might permit the group's cohesion in voting to be used as a defense to an attack on an

at-large system. Under this analysis, the treatment of two minorities as one could have similar effects on the drawing of district lines. In my view, the possibility that the panel's consolidation theory could be embraced by defendants in future cases raises basic questions of congressional purpose. Stated another way, would this court accept the consolidation theory if it had been made by a city defending against a claim that minority interests of Black or language minorities had been submerged by the way in which the district lines were drawn?

Even if this difficult issue did not demand en banc consideration, we still should review the manner in which the panel analyzed the "cohesiveness" of the consolidated faction. The panel asked only whether Blacks and Browns are cohesive as a group. It did not require that either group, taken individually, vote as a cohesive unit. The panel's approach thus permits a coalition of two groups unrelated to each other by more than a common political agenda, and neither of which itself votes cohesively, to qualify for the protections of the Voting Rights Act. A decision of such importance, even if it is warranted, ought to be made only after consideration by our full court.

Finally, the panel accepts without discussion that the cohesiveness of the combined group need be proven only by a preponderance of the evidence rather than some higher standard, such as clear and convincing evidence. Congress had instructed us to steer between an effects test and proportional representation. This is a course so difficult that use of the lesser standard presents an unacceptable risk of failure. It is not an answer that the parties do not argue for higher standard; there is no basis for assuming that preponderance of the evidence should be used in the absence of complaint. We should at least explain that we have not decided the point, which we have not.

The Supreme Court's decision in *Gingles* left undecided fundamental questions under the Voting Rights Act. Today

we fail to give to protected minorities, district courts, state government, and the bar our best considered reading of the core meaning of legislation that speaks to the essence of our arrangements of governance. We can do better but if we will not, hopefully the Supreme Court will do so.

---

* District Judge of the Western District of Louisiana, sitting by designation.

** Judges Rubin, Johnson and Smith did not participate in the en banc poll.

1. "Language minority citizens" refers to those persons who are Asian American, American Indian, Asian natives, or Spanish heritage.

> Based on usage by the Bureau of the Census, the category of Asian American includes persons who indicated their race as Japanese, Chinese, Filipino, or Korean. The category of American Indian includes persons who indicated their race as Indian (American) or who did not indicate a specific race category but reported the name of an Indian tribe. The population designated as Alaskan Native includes persons residing in Alaska identified themselves as Aleut, Eskimo, or American Indian. Persons of Spanish heritage are identified as (a) "persons of Spanish language" in 42 States and the District of Columbia; (b) "persons of Spanish language" as well as "persons of Spanish surname" in Arizona, California, Colorado, New Mexico and Texas; and (c) "persons of Puerto Rican birth or parentage in New Jersey, New York and Pennsylvania." Letter from Meyer Zitter, Chief Population Division, Bureau of the Census, to House Judiciary Committee, April 29, 1975.